

IS THERE AN INTERNATIONAL RULE OF LAW?

At the national level, it is now recognised that democracy depends not only on regular free and fair elections, but also on respect for the Rule of Law. We should not forget that Hitler, Milosevic and Mugabe destroyed the Rule of Law, after coming to power or remaining in power after elections that were deemed to be free and fair. In more recent times there is Viktor Orban in Hungary, who has violated the rule of law after increasing support in free and fair elections. So, too, in Turkey, Recep Erdogan has assumed autocratic powers albeit after an election that was far from free and fair. Those leaders all have something in common - they were elected by voters who were living in fear, whether economic or political.

I am confident that we can all agree that, at the national level, the core of the doctrine of the Rule of Law – lies the separation of powers between the legislature, the executive and the judiciary; the independence of the judiciary; and an independent legal profession; equality before the law; and due process. If any of these principles is compromised, the consequences for democracy are invariably devastating and destructive.

In a constitutional democracy fundamental rights are designed to protect minorities and fringe or marginalised groups. For too many, and especially populist leaders, the constitution tends to be regarded as being designed to empower government and not, as it should be, recognised as a brake on the misuse of majority rule. I need hardly add that the majority hardly needs constitutional protection.

(Mandela/ De Klerk - referendum and the death sentence)

In attracting foreign investors to our shores, the rule of law is a crucially important attraction. Foreign investors wish to know that their contracts with South Africans will be enforced, if necessary, by fair and open courts. It is at this point that the rule of law at both the domestic and international levels converge.

Let me then turn to the international context. How, if at all does the Rule of Law apply to the international community? There is no international legislature and no international executive. Both are crucial to the rule of law at the domestic level. There is, however, a fast-growing international judiciary. Is this a paradox? I would suggest not. Without an international legislature, there are certainly international laws. Their sources are primarily international treaties and customary international law. They are based upon the voluntary agreement of sovereign nations. The absence of an international legislature makes law-making cumbersome and time-consuming but that is an inevitable consequence of the sovereignty of nations.

Notwithstanding these differences and difficulties, there are international laws that touch on many aspects of our lives. These laws are universally respected and applied. They are the laws that control civil aviation and allow civilian aircraft unhindered use of domestic air space; laws relating to posts and telecommunications - including the delivery of mail from and to countries that have no political relationship with each other. Then, there is the law of the sea and international trade and those are areas in which you have expertise. The Law of the Sea Tribunal in Hamburg becomes busier with each passing year.

And, of course, the rapid growth of literally hundreds of treaties relating to international criminal law – trafficking in drugs, trafficking in people, extradition,

refugees, war crimes and terrorism, and also a resurgence in recent years, of the oldest of international crimes, piracy.

More and more courts are being established to implement these laws – the Law of the Sea Tribunal, the Appellate Body of the World Trade Organization, the International Criminal Court, and the few hybrid criminal courts still operating, namely those in Cambodia and Lebanon and, very recently, in the Central African Republic. There are regional courts such as the European Court of Justice, the European Court of Human Rights, the African Court of Justice and the African Union Court of Human and Peoples Rights, and the Inter-American Court of Human Rights. There are just too many sub-regional courts to mention. I need hardly draw your attention to the objects of the Maritime Lawyers Association, one of which is to co-operate with, promote and consider international maritime laws.

Each year there are many hundreds of opinions and orders coming from international courts. The great majority of them are honoured and implemented – they are either complied with or in some cases enforced. The number of international and regional judges has grown exponentially. And, I need hardly say, that the legal profession, in many jurisdictions, has responded to this growth industry.

In the context of enforcement, the absence of an international executive power can be troublesome. It makes the implementation of some international laws more difficult as it is dependant solely on the goodwill and cooperation of sovereign governments. However, as the world contracts, most governments recognize the importance of reciprocity with regard to international law and order. For this reason compliance and cooperation is growing. It is in the interests of states to comply with orders of international and regional courts rather than being seen to be an outlaw.

This whole structure, of course, is being vilified and defied by the Trump Administration. It is attempting to give effect to the natural disinclination of the powerful to be restricted by the law. By reason of their power, some of their leaders believe that what they decide is the law.

One of a number of serious negative consequences of the policies of the Trump Administration is its purposeful sabotage of the World Trade Organisation. The WTO is the only international organisation dealing with the global rules of trade between nations. Its main function is to ensure that trade between nations flows as smoothly, predictably and freely as possible. Its strength and vulnerability is that, unlike almost all other international organisations, it acts by consensus. In effect, each member state has a veto over its decisions. It is that vulnerability that is being manipulated by the Trump Administration. The WTO Appellate Body is the highest court dealing with trade agreements. It has ruled on hundreds of the cases each year. Its most frequent customer has been the United States, followed by the European Union - the main trading nations. In recent years China has been a quickly growing customer of the Appellate Body of the WTO. What the trading nations have had in common, until recently, has been the wish that trade agreements should be carried out according to their terms.

The most visible consequence of the Trump attack on the WTO is its vetoing the appointment of judges to fill vacancies on the Appellate Body. There are only seven judges. They have always been elected by consensus. There are now two vacancies and a third is imminent. There are thus five judges at the moment and a quorum is four. The absence of a quorum would mean the end of the Appellate Body and that could come about before the end of next year. In the meantime the work of the Appellate Body is becoming less efficient owing to the shrinking number of judges.

The similarity of the rule of law, at the international and the domestic level, is that it requires that all nations should be treated equally and should be subject to the same laws - the powerful and the weak, the wealthy and the poor. And, as in domestic situations, the wealthy and the powerful resent being constrained in their actions yet expect others to be constrained. The Trump administration is more frequently using its power to compel other governments to submit to its will. As we are now witnessing, some of those nations are pushing against that and international and regional trade agreements are being concluded without the United States - recently between the European Union and Japan and before that, the 11 members of the Trans-Pacific Pact who are proceeding notwithstanding the withdrawal of the United States. It is now formally known as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership. Its members are Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam. There are indications that other nations will be eager to join including Britain after it exits the European Union.

Other aspects of the rule of law apply at the international level. There is the separation of powers between the judiciary and the governments that appoint international judges, as well as between those judges and their parent organisations.

One of the problems that has arisen over the years relates to judges being able to serve more than one term. In its initial decades, judges of the European Court of Human Rights were allowed two successive five-year terms. It was feared that some judges who desired a second term were, or were reasonably suspected of being, astute in not antagonising their own governments which would have to nominate them for re-appointment. A few years

ago the rules were amended and judges may now only enjoy one term of nine years. This was important to ensure the independence of the judges.

As the chief prosecutor of the United Nations International Criminal Tribunal for the former Yugoslavia and Rwanda, the independence guaranteed me by the Statute of the Security Council was crucial. It was provided that the Chief Prosecutor was not to take instructions from any person and body. That clearly included the United Nations itself. When I indicted Radovan Karadzic and Ratko Mladic in 1995, the then Secretary-General, Boutros Boutros-Ghali, rebuked me. He told me that my action would jeopardise the peace efforts then under way with the Balkan States. My response was that I was acting in pursuance of the mandate given me by the Security Council. He then told me that I was only UN official who was independent and that gave him a problem - he did not know how to deal with me! As it turned out the indictment of Karadzic enabled the Dayton Peace negotiations to be held and that ended the war in the Balkans.

The effect of all this is that the basic values of the rule of law - the supremacy of the law, equality before the law, and the existence of independent judicial systems are essential if these international institutions are to achieve their purpose. It was indeed expressly recognised in the United Nations Millennium Declaration by Heads of State who resolved to “strengthen respect for the rule of law in international as in national law”. As was authoritatively stated, this implies that “every nation that proclaims the rule of law at home must respect it abroad and that every nation that insists on it abroad must enforce it at home.”

So where are we in 2018? Not in good shape. The most serious attacks on the international rule of law are coming from the United States. As I have already indicated, the powerful do not like being constrained by the law. That

said, it has been accepted by the powerful and weak that the law fundamentally works for the benefit of all. It makes sense to have agreements voluntarily respected and that is the basis on which the great majority of states have acted for many decades.

The Trump approach is to bully and threaten other states to adhere to the doctrine of “making America great!”. Well, the bad news for the United States of Trump is that the international community does not buy into that doctrine. The Europeans have decided that the United States is no longer a reliable friend and it is quickly adopting a plan B - in its relationships with other nations to proceed without relying on the support of the United States. China and Russia need no encouragement to advance their own power, both strategic and economic.

I would suggest that this is the time for the democracies of Africa, preferably led by South Africa, to join with those states in acting and speaking in a way that makes it clear that the rule of law is not only a fundamental tenet of our Constitution but also fundamental to our relations with other states. We will have a seat on the Security Council for two years from January 2019 and that is a great stage for our government to pursue such a policy. It should do something that regrettably has gone out of fashion - acting out of principle and not only perceived economic benefit.